No. 12491.

In the

# United States Court of Appeals

For the Ninth Circuit.

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PICKERING LUMBER CORPORATION, a Corporation, *Appellant*,

vs.

THE AMERICAN INSURANCE COMPANY, ET AL., *Appellees*.

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## APPELLANT'S REPLY BRIEF.

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## APPELLANT'S REPLY BRIEF.

We have considered the "Brief for Appellees" and are of the opinion it does not present anything new, nor any answer to "Appellant's Brief," and, inasmuch as we believe that brief honestly and fully presents the facts, and applies the applicable law, no extended reply to the "Brief for Appellees" is indicated or necessary.

We do, however, want to refer, very briefly, to five matters:

I.

As to the numerous cases cited and quoted from by us in Point I of the Argument, on pages 26 and 27 of "Appellant's Brief" (*Continental Ins. Co.* v. *Garrett*, 125 F. 589, 590, 6th Cir.; *Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 169 N. E. 386, 391; *U. S.* v. *Moorman*, 338 U. S. 457, 462, 70 S. Ct. 288; *Mercantile Trust Co.* v. *Hensey*, 205 U. S. 298, 309, 27 S. Ct. 535; *Continental Milling & Feed Co.* v. *Doughnut Corp. of America*, 186 Md. 669, 48 A. (2d) 447, 450; *Fernandez & Hnos* v. *Rickert*

*Rice Mills,* 119 F. (2d) 809, 815, 1st Cir.; and *Jacob* v. Weisser, 207 Pa. 484, 56 A. 1065, 1067), holding that the agreement of submission is "at once the source and limit of their (the appraisers) authority," and that "no one is under duty to resort to these conventional tribunals * * * except to the extent he has signified his willingness," and that the agreement of submission "will be carefully construed in order not to force a party to submit to arbitration a question which he did not intend to be submitted," and that the terms of the submission "must not be strained to discover power to pass upon matters in dispute, but the terms must be clear and unmistakable to oust the jurisdiction of the court, for trial by jury cannot be taken away in any case merely by implication," and that such powers must "be made manifest by plain language" in the instrument of submission, and that such powers are "not to be implied," appellees simply say they "have no quarrel with" them. All they say upon this vital point and these determinative cases is "appellees have no quarrel with the cases cited (pp. 26-27) on the general rules of interpretation applicable to reference agreements with respect to determination of the scope of the submission" (p. 56).

Though appellees say they "have no quarrel with these cases," they seek, throughout their brief, to avoid the effect of them and the fundamental principles they announce and stand for. Those cases state the universal law and are decisive of the vital question in this case, and cannot be evaded or brushed aside by the mere statement that "appellees have no quarrel with these cases."

Admittedly, there is no language in the appraisal provisions of the policies that purports to authorize the appraisers to determine questions of law with finality, and the "nonwaiver by appraisal or examination" provision of the policies, shown at R. 27, expressly prohibits their doing so, yet the trial court expressly found that the appraisers did construe the policies and determine questions of law, and, being of the opinion that such, though not expressly authorized, "was implicit in or incidental to"

he appraisal of the amount of loss, *implied* the power in he appraisers "to construe the policies and settle questions of law"—the very thing that the cases cited by us ay cannot be done.

If appellees had an answer to this fundamental point t must be assumed they would have stated it. They have ıot in any way answered it. They have avoided it.

II.

Appellees admit, on page 58 of their brief, as, indeed, hey must, that by the Withers and Ball memorandum to he appraisers (Deft's. Ex. 3) they stated their interpreation of the appraisal provisions of the policies to be, ınd advised the appraisers, that the procedure was "not ı legal procedure nor arbitration," but that "the appraisers are authorized only to determine the amount of loss ustained and the value of the subject of insurance without reference to the question of liability or extent of liıbility for such items of loss" and that "they are not authorized to interpret contract or to deal with the legalties of the contract" and that "should there be questions involved as to coverage, extent of liability, or the aplications of the terms of the contract, the award should ›e in such form and detail that either interpretation of he coverage or liability could be applied." The appellees ›oint to the fact that appellant filed a memorandum with he appraisers (Plf's. Ex. 6), setting forth legal principles ınd rules, and appellees say, in footnote 70 on page 58 ›f their brief, that it is "apparent that *both* parties to his litigation have changed their views with regard to he scope of the reference and the powers of the referees." Certainly appellees have changed their position. They ıave exactly reversed it. But it is not true to say that ap›ellant has changed its position. Appellant did not in any vay challenge, or take exception to, the statement by ap›ellees in the Withers and Ball memorandum to the ap›raisers that the appraisal was "not a legal procedure nor ırbitration" and that the appraisers were "authorized ›nly to determine the amount of loss" and were "not

authorized to interpret the contract or to deal with the legality of the contract," and that should they encounter questions of law their "award should be in such form and detail that either interpretation of the coverage or liability could be applied," but appellant accepted those statements as correct. There was, therefore, complete accord between appellant and appellees, before the appraisers, that this was not an arbitration and that the appraisers were not empowered to pass upon questions of law with finality. And it is only after the appraisers' report, and the finding by the trial court that the appraisers did pass on questions of law, that appellees have reversed their position.

Appellant filed its memorandum to the appraisers upon the authority of *Ciresi* v. *Globe & Rutgers Fire Ins. Co.*, 187 Minn. 145, 244 N. W. 688, 690, wherein, concerning an appraisal pursuant to provisions of a fire insurance policy, the court said:

> "It was not for the appraisers to determine one way or the other the ultimate question of liability. *Although they might consider it as a preliminary matter,* their findings on a question of coverage which would be a decision on a question of law, would not be final." (Italics supplied.)

Appellant hoped to point out to the appraisers the source and nature of legal questions that might arise, which they would have no authority nor power finally to resolve, but with respect to which it would be necessary, as pointed out in the Withers and Ball memorandum, to make their computations in such form and detail that either construction of the law might be applied by others, and hoped to persuade the appraisers to take a preliminary view of the breadth of the coverage which would avoid the necessity of any action to contest the award. Certainly this did not indicate that the appellant considered the proceeding to be an arbitration or that the appraisers were empowered to pass upon questions of law with finality.

Appellees' concession that they have changed and reversed their position shows, at the very least, that there never was any agreement or joint interpretation by the parties before the appraisers that the latter were authorized to decide questions of coverage and of law with finality, and the appraisers were at pains to point out that they understood they were not authorized to do so by saying, in the last paragraph of their report:

> "In reaching such findings the appraisers or umpire did not find it necessary to resolve any legal question of coverage or extent of liability" (R. 170).

## III.

Appellees concede, at pages 52 and 53 of their brief, that it is held in the California cases of *Church* v. *Seitz*, 74 Cal. 287, 15 P. 839; *Dore* v. *Southern Pacific Co.*, 163 Cal. 182, 124 P. 817, 819; and *Bewick* v. *Mecham*, 26 Cal. (2d) 92, 156 P. (2d) 757, that "submissions to determine values are of two kinds: First, where the valuers are to examine the property and fix the value in accordance with their own opinion or judgment; second, where they are to afford the parties a hearing and opportunity to offer evidence, and are to adjudge the value upon a consideration of the evidence, as well as their own opinion." And that the first class is "not a submission to arbitration."

This means that if the agreement of submission does not, in terms, provide for a hearing upon notice and evidence, then the proceeding "to determine value" is not an arbitration, but is a mere appraisal. The very authority cited and quoted by appellees, in footnote 65, on page 54, of their brief, of *17 California Review*, 643, 647, N. 26, says:

> "The distinction between agreements to arbitrate and to appraise has been observed in California, *but the determining factor seems to be whether the agreement provided for a hearing* or for an independent examination of the subject-matter. If the former was the intent, the agreement was regarded as one for ar-

> bitration * * *, but if the latter was the intent, it was regarded as an agreement for appraisement * * *." (Italics supplied.)

In the California case of *Church* v. *Seitz*, 74 Cal. 287, 15 P. 839, the Supreme Court of California said (p. 842):

> "*They could stipulate for the formalities of an arbitration if they chose to do so.* But in a case like the present, where the reference to a third person is provided for in a contract made long before any controversy arises, which contract is made upon valuable consideration other than the mutual promise to submit to the decision of the third party, the decision being merely one link in the chain of the claim, we think that the proceeding is not an arbitration." (Italics supplied.)

In the California case of *Dore* v. *Southern Pacific Co.*, 163 Cal. 182, 124 P. 817, the Supreme Court of California said (p. 819):

> "The agreement for submission in the case at bar was of the second class above mentioned. *It expressly provides that the arbitrators should fix a day to begin the taking of testimony and hear the respective parties.* Cases of this class are usually held to be common-law arbitrations and subject to the common-law rules on the subject." (Italics supplied.)

The last word on the question in California is in the recent case of *Bewick* v. *Mecham,* 26 Cal. (2d) 92, 156 P. (2d) 757, where the Supreme Court of California, in holding the submission to be an appraisement, said (p. 760):

> "*There is nothing in the agreement to indicate* that the arbitrators were to take evidence in a formal proceeding as a basis for their decision rather than their own opinion and judgment."

And then the court quotes from the Seitz case, saying that in that class of cases it is usually held "that the agreement is not properly a submission to arbitration."

To precisely the same effect is the Missouri case of *Dworkin* v. *Caledonian Ins. Co.,* 285 Mo. 342, 226 S. W. 346, where the Supreme Court of Missouri, in holding that an insurance appraisal was not an arbitration, said (p. 849):

> "*Neither are the terms of the policy suggestive of a common-law submission. Notice to the parties of a hearing is not provided for, or the taking of testimony, or that the award shall extinguish liability in the policy.*" (Italics supplied.)

In the instant proceeding the agreement of submission to the appraisers is constituted solely by the appraisal provisions of the policies *and there is not, nor do appellees contend that there is, any provision or language therein requiring, or even suggesting, that the appraisers must hold hearings or take evidence.* In that situation, as held by the last word of the California Supreme Court on the question, in the Bewick case, the proceeding was not an arbitration, but a mere appraisement, just as appellees specifically and correctly advised the appraisers in the Withers and Ball memorandum.

In the *Seitz* case the Supreme Court of California, at page 841, observed and approved the holding in *Scott* v. *Avery,* 5 H. L. Cas. 811, "that a condition in a policy of insurance in a mutual company, that the loss should be 'ascertained and settled by the committee,' was not a submission to arbitration."

*Williston on Contracts,* Revised Ed., Vol. 6, p. 5376, says:

> "The leading examples of appraisal are provisions for determination by third parties of the *amount* of loss in insurance policies."

Appellees, at pages 54 and 55 of their brief, cite the California District Court of Appeal case of *Stockwell* v. *Equitable Fire & Marine Ins. Co.,* 134 C. A. 534, 25 P. (2d) 873, and argue that it holds that appraisers of the

amount of loss under policies of insurance in California must hold a hearing, and upon that basis, they argue that the appraisal of the amount of loss under an insurance policy is a common-law arbitration, and even a statutory arbitration under the California Arbitration Statute. As might be expected, when an appraisal, under the terms of an insurance policy, is attacked upon grounds which would also be fatal to an arbitration, the courts have not always been careful to point out the distinction between arbitration and appraisal, because it is immaterial. That case is typical. There the court referred to the appraisal as "an arbitration and appraisal." It could not be both. However, the distinction was immaterial there. Only two attacks were made on the validity of the appraisal, namely (1) though the insured property was completely destroyed and out of sight, no hearing or notice thereof was given, and (2) one of the appraisers wrongfully conducted himself, dominated the appraisal and dictated the figures, and the evidence indicated the result was not in fact agreed to by the other appraiser. The court pointed out that the insured property was so far destroyed that it was not possible for the appraisers to accurately determine the extent of loss without a hearing; and that the misconduct of one of the appraisers rendered their report invalid. Hence the appraisers' report was invalid whether the proceeding was an arbitration or an appraisal.

At all events, as pointed out, the Supreme Court of California has consistently held, from the time of the Seitz case, in 1887, to the time of the Bewick case, in 1945, that where the instrument under which the valuers are to proceed does not provide that they are to hold hearings, the proceeding is an appraisal and not an arbitration.

Appellees also, at page 55 of their brief, cite the Federal District Court case of *Lundblade* v. *Continental Ins.* Co., 74 Fed. Supp. 795 (D. C., N. D. Cal.), in support of their contention that an appraisal under an insurance policy constitutes a statutory arbitration in California. There the policy covered "machinery and equipment *used in sawmill operations.*" An appraisal was had, after which controversy ensued, defendants maintaining that little, if

any, of the property contained in the award was properly sawmill equipment. Plaintiff, on the other hand, contended that it should include not only the equipment set forth in the award, but, in addition, the value of an edger. The court took evidence and *found as a fact* that the policy insured the items included by the appraisers, but *ruled against the plaintiff as to the edger because the court found from the evidence that the plaintiff, both before and at the time of the appraisal, disclaimed any right to recover for the edger and was thereby estopped to complain of the action of the appraisers.* That judgment was obviously right. The finding of estoppel against the plaintiff determined the case. However, Judge Lemmon went further and said (p. 796):

> "The award of the appraisers was required to be coextensive with the duty. That duty included decision upon both the law and the facts. Their exclusion of the edger may only be changed if grounds specified in Sections 1287 and 1288 of the California Code of Civil Procedure are shown to exist."

Being mystified by that statement, and finding no case supporting it, we obtained copies of the pleadings and the briefs of counsel filed in that case, and found that the pleadings did not raise, and the briefs did not present, any issue touching the distinction between appraisal and arbitration, nor cite any cases or law touching the distinction. To demonstrate that this is so, we are printing the pleadings and briefs of counsel in that case as an appendix to this brief, so that Your Honors may conveniently verify our above statements if you so desire.

The true rule is stated by the New York Supreme Court, in the case of *Petition of American Insurance Co.*, 203 N. Y. Supp. 206, 207, as follows:

> "The Arbitration Law * * * does not make agreements to determine certain facts by appraisal arbitrations, if they had not such nature anterior to its enactment; and the rule persists that an agreement for the appointment of appraisers under the provision of a policy of insurance to determine the

amount of damages to insured property does not constitute an arbitration."

## IV.

Appellees argue, at pages 63 and 64 of their brief, that the testimony of the appraisers was incompetent. The very cases they cite are to the contrary and establish that the testimony of the appraisers was competent. Here the testimony of the appraisers was not offered or admitted to impeach the award by showing any fraud or misconduct of the appraisers, but was offered and admitted to show what matters were submitted to and considered by the appraisers—to show that, in some instances, they failed to discharge the submission, and, in other instances, they exceeded the submission and undertook to determine policy coverages and other questions of law expressly withheld from them.

Typical of the cases cited by appellees is the recent California Supreme Court, *en banc,* case of *Sapp* v. *Barenfeld,* 34 A. C. 582, 212 P. (2d) 233, 239. There the court said:

> "To prove the arbitrators' failure to consider the item of damage from the delay in completion, respondents introduced the affidavit of the arbitrator whom they had appointed, Maurice Fleishman. Appellant's contention that Fleishman's affidavit was inadmissible as tending to impeach his award cannot be upheld. *Although an arbitrator cannot impeach the award by testifying to his fraud or misconduct, his testimony is admissible to show what matters were admitted for decision and were considered by the arbitrators.*" (Italics supplied.)

The court cites *Giannopolus* v. *Pappas,* 80 Utah 442, 15 P. (2d) 353, where the Supreme Court of Utah made practically the same statement.

In the case of *St. Paul Fire & Marine Ins. Co.* v. *Eldracher,* 33 Fed. (2d) 675, 8th Cir., the court treated with this matter fully, and laid down the principles that

establish that the testimony of the appraisers here was clearly admissible. There the court, quoting from *Duke of Buccleuch* v. *Metropolitan Board,* L. R., 5 Exch. 221, said (p. 678):

> "But if the mistake has been as to the extent and nature of the arbitrator's authority, leading him to exceed it, then, inasmuch as an excess of authority by mistake is just as much an excess as if it had been in consequence of a willful disregard of the limits of the authority the award may be impeached as being made without jurisdiction. Were this otherwise, no one who submits to a reference of one thing could be safe from having an award put upon him as to anything else. Of course, any attempt to annoy an arbitrator by asking questions tending to show that he had mistaken the law (upon matters within his authority), or found a verdict against the weight of the evidence, should be at once checked, for these matters are irrelevant. But when the question is whether he did or did not entertain a case over which he had no jurisdiction, the matter is relevant, and nobody can be better qualified to give testimony on that matter than the umpire."

The court then quotes, approvingly, from Wigmore on Evidence, saying:

> "The scope of the issue submitted to him defines the limit of his authority to award; hence, the award as made may always be invalidated by the circumstance that it exceeds that scope. In a jury trial, this is ascertainable from the pleadings and the judge's instructions; and the scope of a verdict and a judgment may always be examined in that respect. In an award, the terms of the contract of submission serve in part the corresponding purpose. But, furthermore, since the judge's and jury's functions are united in the arbitrator, and since he does not by distinct instructions to himself define the issues which he submits to himself, the ascertainment of the issues which he has actually investigated and decided may have to be made by inquiring of him whether he considered certain issues, in order to learn whether those issues, as considered, are within the scope of his authority."

The court then quotes, approvingly, from 2 Greenleaf on Evidence (15th Ed.), Sec. 78, as follows:

> "And though arbitrators, ordinarily, are not bound to disclose the grounds of their award, yet they may be examined to prove that no evidence was given upon a particular subject; and that certain matters were or were not examined, or acted on by them, or that there is mistake in the award."

We submit there can be no doubt that testimony of the appraisers here was admissible.

## V.

With reference to our contention of legal error on the part of the appraisers in charging the box lumber to the box shook mill at OPA ceiling prices, appellees say, on pages 33 and 34 of their brief, that:

> "It is perfectly clear that if one could determine with complete certainty the 'actual' cost of the first operation (producing the box lumber from the tree to the point of diversion to the box factory) this would *not* be an appropriate basis to use for costing the lumber into the box factory, because to do so would throw *all* of the profit to the second operation (producing box shook from box lumber in the box factory) and *none* of it to the first operation."

Then appellees say:

> "By relying upon this argument appellant is in the position of contending that none of the profit made on the shook should be allocated to the operation prior to the point of diversion. Even appellees do not take such an extreme position, as this would mean that the box lumber would be charged into the box factory operation *at a true cost,* which would thereby *throw all of the profit* on both operations *to the box factory* and *hence would further reduce appellant's insurance recovery.*" (Italics supplied.)

We ask Your Honors to please note that statement with particularity. It accurately states—as we have repeatedly

tried to point out in our brief—our position and the actual facts, as shown by the evidence. Not a penny of the profits made on the box lumber and the shook were, in very truth, "allocated to the operation prior to the point of diversion," by appellant or by its proof of loss. And this does "mean that the box lumber would be" (and it was) "charged into the box factory operation *at a true cost which would*" (and did) "throw all the profit on both operations to the box factory, and hence would" (and did) "reduce appellant's insurance recovery," all as set forth in the proof of loss and as now claimed.

This has been demonstrated, in our brief, but we want to make the matter crystal clear, and now demonstrate it again:

| | | |
|---|---|---|
| Pickering's actual cost for the box lumber to the point of diversion to the box factory—without a penny's profit being allocated to operations prior to that diversion point—and hence its *true cost* therefor—was | $39.86 per M | |
| Its cost of manufacturing the lumber into shook was | 11.65 " " | |
| Its shipping costs were | .97 " " | |
| Under-run of 191,670 feet | 1.03 " " | |
| Its total actual cost was | 53.51 " " | |
| Its total realization was | | $60.22 |
| Its total profit was | 6.71 | |
| | $60.22 | |

$6.71 times 8,828,644 feet (all credited to appellees)= $59,240.93.

Yet the appraisers, by ignoring Pickering's actual, or "true," cost for the box lumber of $39.86 per M, and by indulging a fictional sale to the box mill, at the diversion point, at the inapplicable OPA price of $31.55 per M—or at $8.31 per M less than Pickering's actual, or "true," cost for the lumber, to that point—calculated an increase (wholly unreal) in the recovery from the box mill operations from $6.71 to $15.02 per M, or by said $8.31 per M, or ($8.31 x 8,828,644 feet) $73,365.93, and thus improperly increased the figure for recovered fixed charges and ex-

penses, by box mill operations, from the $59,240.93 credited by appellant, to $132,606.86, to appellant's injury, as a matter of law, in the amount of $73,365.93.

## Conclusion.

In conclusion, we respectfully submit that the judgment of the District Court should be reversed and appellant allowed to proceed to try its case before a jury under Count Two of its Counterclaim.

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# Appendix

In the Superior Court of the State of California
in and for the County of Humbolt

Fred H. Lundblade, E. S. Hansen, and Charles R. Barnum, Partners doing business as Salmon Creek Redwood Co., Plaintiffs,

vs. No. 21747

Continental Insurance Co., a Corporation, Defendant.

Filed Oct. 23, 1946. Fred J. Moore, Jr. County Clerk.
By F. M. akes, Deputy.

**Complaint on Fire Insurance Policy.**

Plaintiffs complain of the defendant and for cause of action allege:

1. That plaintiffs were the owners of a sawmill, and the machinery and equipment therein, near Beatrice, in the County of Humboldt, State of California, at the time of its insurance and destruction by fire, as hereinafter mentioned.

2. That on the 19th day of July, 1945, in consideration of the sum of $450.00 to it paid, the defendant executed to the plaintiffs a policy of insurance on said machinery and equipment, a copy of which is hereto annexed, marked "Exhibit A," and by this reference made a part of this complaint.

3. That on the 2nd day of December, 1945, said sawmill, machinery and equipment were totally destroyed by fire.

4. That the plaintiff's loss by said destruction of said machinery and equipment thereby amounted to more than the amount of said insurance.

5. That immediately following said loss, plaintiffs reported the same, furnished the defendant with proof of their said loss and interest, and have otherwise duly performed all the conditions of the said policy on their part.

6. That the defendant has not paid said loss, nor any part thereof.

7. That the plaintiffs are partners doing business under the name and style of SALMON CREEK REDWOOD CO. That prior to the date hereof, plaintiffs filed and published the certificate of doing business under a fictitious name as is required by the provisions of Section No. 2466 of the Civil Code.

8. That the defendant is a corporation of the State of New York.

WHEREFORE, the plaintiffs pray judgment against the defendant in the sum of $30,000.00, with interest thereon from December 2, 1945, for costs herein, and for such other relief as may be proper.

FRED H. LUNDBLADE

Fred H. Lundblade

HILL & HILL
Attorneys for Plaintiffs.

STATE OF CALIFORNIA,
COUNTY OF HUMBOLDT. } ss.

FRED H. LUNDBLADE, being duly sworn, deposes and says: That he is one of the plaintiffs named in the foregoing complaint; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge.

FRED H. LUNDBLADE

Subscribed and sworn to before me this
23 day of October, 1946.
ARTHUR W. HILL, JR.
NOTARY PUBLIC in and for the County of
Humboldt, State of California.
(SEAL)

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In the United States District Court,
in and for the Northern District of California,
Northern Division.

Fred H. Lundblade, E. S. Hansen, and Charles R. Barnum, Partners doing business as Salmon Creek Redwood Co., Plaintiffs,

vs. No.———

Continental Insurance Co., a Corporation, Defendant.

**Answer of Defendant.**

Comes now the defendant, Continental Insurance Company, and, answering the complaint on file herein, admits, denies and alleges as follows:

I.

Admits the allegations in paragraph 1.

II.

Denies the allegations in paragraph 2, save and except that it admits that on the 19th day of July, 1945, in consideration of the sum of $450, defendant issued to plaintiffs a "Scheduled Property Floater Policy" of Inland Marine Insurance in the form attached to said complaint, in the total amount of $30,000.00, subject to maximum liability at any single location of not to exceed $10,000.00; and defendant alleges that said policy of insurance did not cover said sawmill, or its machinery or equipment, but was obtained to and did cover that portion of certain special machinery and equipment, which was in said mill temporarily, which would be usual to sawmill operations; and that said sawmill, together with its machinery and equipment were separately insured and that the loss and damage thereto has been paid.

III.

Denies the allegations of paragraph 3, but admits that on or about December 2, 1945, said sawmill, its machinery and equipment, and the machinery and equipment insured by this defendant, together with other equipment, were damaged by fire.

IV.

Denies the allegations of paragraph 4.

V.

Denies the allegations of paragraph 5, but admits that on April 4, 1946, plaintiffs served on defendant purported proofs of loss.

VI.

Admits the allegations of paragraph 6, but alleges that it tendered to plaintiffs the full amount of their loss and damage, as determined by competent and disinterested appraisers, but that plaintiffs refused, and have ever since refused, to accept said payment of said loss.

VII.

Admits the allegations of paragraphs 7 and 8.

For the second and separate defense to said action, defendant alleges:

I.

The policy of insurance issued by defendant provides:

> "In case the Assured and this Company shall fail to agree as to the amount of loss or damage, the same shall be ascertained by two competent and disinterested appraisers, the Assured and this Company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately the sound values and damage, and

failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of the loss; the parties thereto shall pay the appraisers respectively selected by them, and shall bear equally the expense of the appraisal and umpire."

II.

That on or about April 9, 1946, defendant demanded an appraisal of the amount of loss; that thereafter plaintiffs and defendant each selected a competent and disinterested appraiser; that said appraisers first selected a competent and disinterested umpire; that said appraisers together then estimated and appraised the damage to machinery and equipment on which loss was claimed by plaintiffs; that said appraisers failed to disagree on any item of loss or damage and did not submit any differences to said umpire; that the estimate and appraisal of the amount of loss and damage to the property claimed by defendants was the sum of $8235.53.

III.

That of the property submitted to said appraisers, as to which loss and damage was claimed by plaintiffs, the actual loss and damage to "machinery and equipment usual to sawmill operations," as determined by said appraisers, was and is the sum of $2797.95.

IV.

That on August 9, 1946, defendant issued to plaintiffs its draft No. 32286 for $100 and its draft No. 32287 for $2697.95 in full settlement of said claim for loss and damage; that plaintiffs refused to accept said tender; that thereafter defendant, by and through its attorneys, again tendered to plaintiffs the full amount of the loss as determined by the appraisers on property coming within the coverage of the policy.

V.

Defendant hereby tenders to plaintiffs the sum of $2797.95 and hereby consents to entry of judgment in favor of plaintiffs in said sum of $2797.95, in full of all claims and demands of plaintiffs against defendant.

For a third, further and separate defense to said action, defendant alleges:

I.

Defendant alleges, and incorporates by reference, all the allegations of the second and separate defense to said action.

II.

That, in and by the purported proofs of loss, plaintiffs claimed loss and damage to "1-stearns 8 x 60 6 saw edger"; that plaintiffs failed to exhibit said edger to said appraisers; that, prior to the appraisal, plaintiffs sold said edger and permitted the same to be removed, thereby preventing an appraisal as to any loss or damage said edger might have sustained; that an edger is not "machinery and" (or) "equipment usual to sawmill operations."

WHEREFORE, having fully answered, defendant prays:

1. That judgment be entered for plaintiffs in the sum of $2797.95—less defendant's costs of suit, and such attorney's fees and expenses as this court may seem just and reasonable;

2. For such other and further relief as may seem meet and proper in the premises.

H. A. THORNTON
EVANS M. TAYLOR
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In the United States District Court,
in and for the Northern District of California,
Northern Division.

Fred H. Lundblade, E. S. Hansen, and Charles R. Barnum, Partners doing business as Salmon Creek Redwood Co., Plaintiffs,

vs. No.———

Continental Insurance Co., a Corporation, Defendant.

**Plaintiff's Memorandum of Points and Authorities.**

There are only two issues involved in this matter:

1. Whether certain equipment such as a planer, a surfacer, a grinder, tractor parts, dry kiln equipment and cable were covered under the insuring clause of the contract "machinery and equipment usual to sawmill operations."

2. Whether the plaintiffs forfeited their right to insurance coverage on the Sterns 8x60 six saw edger by reason of the sale of certain minor parts therefrom by the plaintiff, Lundblade, on March the 5th, 1946.

I.

With respect to the first issue, it is submitted that the insuring clause of the contract—"machinery and equipment usual to sawmill operations"—is broader and more comprehensive than the simple term "sawmill machinery." The word "equipment" certainly is an addition to the word "machinery" in the insuring clause and must refer to pulleys, parts, tools, cables, etc., which complement and are used in connection with the machinery itself.

The term "sawmill operations" used in the policy would seem to be broader than the single and customary term "sawmill," and would connote that everything incidental or necessary to the proper functioning of a sawmill was included in the coverage.

It requires no citation of authority to support the proposition that the wording of a contract will be construed

most strongly against the one who prepares it. This is particularly true in the case of insurance contracts.

In addition to the plaintiff, Lundblade, four witnesses were called who testified that all property described in the award of appraisers (Plaintiff's Exhibit 3) was "machinery and equipment usual to sawmill operations." There was not a single exception made by any of these witnesses. Two of these witnesses, Winfield Wrigley and Carl Libbey, have been managers of sawmills comparable in size and output to the mill operated by plaintiffs herein for a period in excess of thirty years, and two of the witnesses, Lee Smith and E. J. Biord, are, and for many years have been, salesmen of sawmill equipment. All of these men have had a wide and long experience in their respective fields and their character, integrity and standing in the community is unquestioned.

Opposed to this testimony was that of the insurance adjuster, Wilfred Ball, the machinery appraisal expert, William Gardner, and Robert S. Glenhill, who is connected with a firm in San Francisco, specializing in hydraulic presses and pumps. Each of these witnesses claimed that certain items in the list of property were more in the nature of planing mill or molding mill equipment than "machinery and equipment usual to sawmill operations." None of these witnesses had had actual sawmill experience, had never operated a sawmill nor been employed by one.

Such authorities as have been found also support the plaintiffs' contentions:

"Machinery" means somewhat more than "machine." It includes whatever is necessary to the working of a machine; as the saw in a sawmill.

*Anderson's Law Dictionary,* page 643.
*Seavey* v. *Central Ins. Co.,* 111 Mass. 541.
*Pierce* v. *George,* 108 Mass. 78.
*State* v. *Avery,* 44 Vt. 629.
*Buchanan* v. *Exchange Fire Ins. Co.,* 61 N. U. 26, 33.
*Bouvier's Law Dictionary,* page 742.

Boiler and machinery insurance covers boilers, tanks, pipes, pressure vessels, engines, wheels, electrical machinery or apparatus connected therewith or operating thereby.

Sec. 111, Ins. Code of Calif.

A planing machine in a sawmill has been held to be included in the term "machinery" in a policy of fire insurance.

*James River Ins. Co.* v. *Merritt,* 47 Ala. 387.
*29 Am. Jur.* 222.
*Ann. Cas.* 1918 # 209, 210.

A windmill and stock scales (which were stored in a granary) were held to be "farming utensils," and within a policy issued to one engaged in general farming. The Court pointed out that the term "utensil" was much broader than the term "tools."

*Murphy* v. *Continental Ins. Co.* (Iowa), 157. Northwestern 855, LRA 1917 B, 934 Note. LRA 1917 B 937.

The following illustrations were obtained from cases noted in Couch on Insurance, Volume 3, Section 764:

In *Capital Fire Insurance Company* v. *Carroll* (Okla.), 109 Pac. 535, the insuring clause was "flour mill and such other machinery as is usual to roller mills." Held to cover: machinery used in manufacture of meal, bran and other feed by-products.

In *Seavey* v. *Central Insurance Company,* 111 Mass. 540, the insuring clause was "engine and machinery for manufacture of tin ware." Held to cover: movable dyes used in giving form to goods manufactured and worked by a press.

In *Phoenix Insurance Company* v. *Favorite,* 49 Ill. 259, the insuring clause was "articles used in packing meat." Held to cover: Coal in the yard necessary to the operation of the business.

In insurance on a laundry, the term "machinery" was held to embrace the boiler, pipes and fittings used for motive power. 29 Am. Jr. 221.

The contention of the defendant here is similar to that that might be made in the case of a claim under a policy covering "laundry equipment." If defendant's contention here is sustained, they might equally well contend that the mangles and irons for pressing the clothing after it had been laundered were not truly laundry equipment. In the case at bar the surfacer and planer were used for finishing the product, just as the mangles and irons are used for finishing the laundry product.

II.

On March the 5th, 1946, more than three months after the fire, plaintiff, Lundblade, sold some salvage, consisting of handles and levers, from the edger for the sum of $75.00. The value of the edger immediately preceding the fire, according to the various witnesses, was from $2500.00 to $5000.00.

There is no question but that this edger was sawmill equipment. All of plaintiffs' witnesses so testified, and it was not denied by any of defendant's witnesses. Webster's Dictionary defines an edger as "a machine for edging lumber, especially one with feed rolls, press rolls and several circular saws."

The only question here then, is whether plaintiffs forfeited their coverage by the sale of $75.00 worth of parts on March the 5th from an edger worth immediately before the fire in excess of $2500.00.

Mr. Lundblade testified that at the time he sold the parts, he believed the matter of adjustment had been completed. The property had been viewed and examined by Bruce Simons, the local adjuster for the insurance company, by Wilford Bell, the special adjuster from San Francisco, and by William Gardner, the machinery appraisal expert, not once, but several times. Until after the date of the sale of the parts, plaintiff had no notice that an appraisal would be demanded by the insurance company, and since the policy limitations ($10,000.00 for ma-

chinery and equipment at any one location) was wholly inadequate to compensate plaintiffs for their loss, it is only natural that they should attempt to salvage whatever was possible by a sale.

True, Mr. Lundblade did not report the edger in his original letter and proof of loss dated February —, 1946, which he explains by saying that his values on the other equipment so far exceeded the policy limitation mentioned above that he felt it was unnecessary to list all of the equipment. It was not until after the adjusters for the insurance company had indicated that the amounts allowed would be considerably less than he claimed that he included the edger as part of the loss.

The sale of salvage after a fire will not act as a breach of the policy, avoiding liability, where such sale takes place after a reasonable time for the insurer to demand an appraisement.

29 Am. Jur. 940.
*Springfield Fire* v. *Hayes* (Okla.), 156 Pac. 673, LRA 1917a 1078.
*McCullough* v. *Mill Owners Mutual Fire* (Ala.), 8 So. (2d) 404.

In the absence of a policy provision a sale of part of property insured does not avoid policy as to remainder.

20 Am. Jr., Sec. 639, 629.

A change of interest in a subject insured, after the occurrence of an injury which results in a loss, *does not affect* the *right* of the *insured* to *indemnity* for the loss.

Ins. Code, Sec. 301.
14 Cal. Jur. 468.

It is respectfully submitted that judgment should be for the plaintiffs for $10,100.00—$10,000 being the maximum coverage at one location and $100.00 for the water tank at the second location as shown by the appraiser's award (Plaintiffs' Exhibit 3).

HILL & HILL,
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In the United States District Court,
in and for the Northern District of California,
Northern Division.

Fred H. Lundblade, E. S. Hansen, and Charles R. Barnum, Partners doing business as Salmon Creek Redwood Co., Plaintiffs,
vs. No. 5721
Continental Insurance Co., a corporation, Defendant.

**Plaintiff's Reply Memorandum of Points and Authorities.**

Since we believe the issue is fairly before the Court, and no additional authorities have been found bearing upon the subject, the plaintiffs will submit this matter with a few comments upon the argument and authorities contained in defendant's Memorandum of Points and Authorities.

I.

We cannot agree with defendant's statement throughout the Memorandum that the evidence clearly showed that the items listed were not "machinery usual to sawmill operations." On the contrary, two mill operators of long experience and two sawmill equipment salesmen testified that *all* items were considered by them as "machinery and equipment usual to sawmill operations." These witnesses did not "follow the lead of Winfred Wrigley" as stated by defendant. All of them were mature men, in separate businesses, without connection. Each of them was familiar with the plant which Lundblade operated. Each of them had had *sawmill* experience or sawmill machinery sales experience in excess of twenty years.

Defendant argues that the tractor parts and the wire rope or cable was used to "haul logs from the cold deck—in other words, part of the logging operation" (Defts. Memo p. 2, lines 25-27). Getting the logs from the cold deck into the sawmill is part of the sawmill operation, not a logging operation. The logging operation is complete

upon delivery of the logs to the mill, whether they are placed in a cold deck, in a pond or directly upon the landing. Hence, all items of equipment used in obtaining the logs from the cold deck are "machinery and equipment usual to sawmill operations."

We concede that all sawmills do not have the facilities for finishing lumber. That does not make the equipment used in finishing lumber any less a part of a sawmill. Indeed, the authorities quoted by defendant recognized this. The citation from 38 C. J. 146, Sec. 11, says that a sawmill "often includes other woodworking machines such as lathe and planing machines." (See defendant's Memorandum p. 4, ln. 22-24. See also the case of Henry Gossel, 127 Fed. 604, cited defendant's Memorandum p. 4.)

If there was any desire to be technical in the application of the language used in the insuring clause of the contract, it was the defendant's place, since it wrote the agreement, to be very definite and particular in the description of the property it intended to insure. A contract will always be construed most strongly against the one who prepares it, and particularly is this true in the case of insurance contracts. We submit that by common usage, everyday understanding, as well as literally and technically, each and every item listed in the appraiser's report is and should be construed as "equipment and machinery usual to sawmill operations."

It is significant that defendant called not a single sawmill man, not a single sawmill equipment salesman, from this area or elsewhere, but relied entirely upon the testimony of insurance adjusters and a hydraulic pump salesman. Certainly, the understanding of terms of those engaged in the very business is much more important and conclusive than those, who by the very nature of their occupation, are interested in minimizing the amount which an insurance company is required to pay.

## II.

The defendant concedes that the edger "was unquestionably sawmill equipment" (Defts. Memo. p. 6); that it had a value of from $1250 to $4000. It was included in the formal proof of loss, although it was not mentioned in the preliminary letter which Mr. Lundblade sent to the insurance company.

Defendant asks a number of questions pertaining to their edger, as follows:

Why was it omitted, if it had such value, while items as low as $64.38 are included? Why was it the only machine which was stripped—if that is true? Why was it stripped, after plaintiff was instructed to preserve the property? Why was it not called to the attention of the adjuster, the machinery expert and the appraiser? (Defts. Memo p. 6).

Defendant then concludes: "Frankly, because this story is absolutely unbelievable."

We submit, there is no other explanation for the matters surrounding this edger. Mr. Lundblade is a man of unquestioned integrity in this community and his testimony in this trial is unimpeached. The edger was not omitted from the proof of loss nor was it omitted from the items the appraisers were requested to appraise. A few parts were sold from it (which defendant labels as "stripped") worth $75. These were sold only *after* it had been examined by Mr. Simons, the local adjuster for the company, Mr. Ball, the special adjuster from San Francisco and Mr. Gardner, the company's machinery expert. Mr. Lundblade believed, as any normal individual would believe, that the matter had been fully concluded and that he should salvage and save as much of his damage as he could. He had an offer of $75 for certain parts from the edger which he accepted. Then, and only then, the company asked for an appraisal. There is certainly nothing unbelievable about this story.

Nor did the sale by Lundblade of part of the machinery, after the fire, lessen the carrier's liability, for such act did not vioate any of the policy provisions. Sec. 2032, Ins. Code. Sec. 2032, Ins. Code reads:

> After the execution of a contract of fire insurance, an act of the insured does not affect the contract unless the act violated policy provisions, even though such act increases the risk and causes a loss.

Furthermore, the measure of indemnity is the expense to the insured of replacing the thing lost or injured in its condition at the *commencement* of the fire.

> 14 Cal. Jur. 561.
> Ins. Code, Sec. 2051.

Accordingly, it was a commendable act of the insured to salvage what he could and thus reduce the amount of his loss, and lessen the carrier's liability. There was no provision in the policy limiting or forbidding salvaging operations after the fire and the contract of insurance was not affected.

> Ins. Code, Sec. 2032.
> 14 Cal. Jur. 508.

It is nowhere contended, in allegation or proof, that the appraisers did not in fact see the framework of the ruined edger—minus handles and levers. They did learn, however, that those same handles and levers had been sold for $75. That the value of the remainder of the wrecked edger, plus $75, the value of the missing parts, would be a fair valuation of the edger in its burned condition. But even that would not be a fair value of the edger *before* it was burned. It could not then be exhibited in its unburned condition. The appraisers could (and possibly did) learn of its unburned value from other sources. Learning that fact and subtracting $75, they would have the true loss on the edger, and that, we submit, the Court would be justified in finding to be the loss on the edger.

**Conclusion.**

It appears that the insurance company is attempting to avoid its liability for loss under the terms of the policy here for very technical reasons. Perhaps the policy was

written at too low a rate in the first instance. Perhaps the risk was not a good one. Perhaps the property insured was not described with sufficient clarity.

The reason for the company's refusal to pay is immaterial. The fact remains that it had written the policy, dictating the words, the terms and the conditions. Plaintiff herein has complied substantially with all of those terms and conditions and is entitled to reimbursement for his loss.

Respectfully submitted,

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In the District Court of the United States
in and for the Northern District of California,
Northern Division.

Fred H. Lundblade, et al., Plaintiffs,
vs. No. 5721
Continental Insurance Co., Defendant.

**Defendant's Points and Authorities.**

As plaintiff's counsel states there are only two points involved, there being no attack on the appraisal, and it being conceded that the prayer for $30,000 is in error, as the coverage is limited to $10,000 at any one location.

I.

Were the items listed below covered under the policy as "machinery and equipment usual to sawmill operations"?

The items which the insurer claims are planing mill, dry kiln or logging equipment are set forth and numbered in the order in which they appear in the schedule attached to the proof of loss. The amount of loss is that determined by the appraisers.

| | Item | Loss |
|---|---|---|
| 1 | Yates Moulder | 900.00 |
| 2 | Single Side Surfacer | 750.00 |
| 8 | Berlin Knife Grinder | 450.00 |
| 9 | American Band Rip Saw | 1100.00 |
| 12 | Dry Kiln equipment | 200.00 |
| 14 | Misc. Cletrac parts | 650.00 |
| 15 | Radiator Assembly | |
| 16 | Differential Assembly | |
| 18 | 280 Ft. Steel Core Wire Rope | 123.20 |
| 19 | 222 Ft. " " " " | 64.38 |

The total loss found as to these items amounts to $4237.58. This, deducted from the total of $8135.53 found by the appraisers, would leave an insured loss of $3897.95. We have not deducted the loss found to item 13, the Wisconsin engine, as we concede that the proof shows it could have been used in sawmill operations.

The evidence clearly shows that the Moulder and Surfacer are planing mill equipment; that while the knife grinder would grind "hog" knives, it would be silly to use a grinder capable of handing the long knives used in planing mill equipment to grind the short coarse knives of a "hog"; and that this band rip saw was too light for sawmill work, but was suited to that of a planing mill.

The designation of item 12, "Dry Kiln equipment," definitely shows it was not sawmill equipment, and this is supported by the evidence.

Items 14, 15, 16 are parts of a caterpillar, which plaintiff's evidence shows was used in the yard to haul logs from the cold deck—in other words, part of the logging operation.

Items 18 and 19, wire rope, had been cut into lengths designed to haul and handle logs in the woods or yard.

It was very interesting to note that plaintiff's witnesses followed the lead of Winfield Wrigley, who was the first called after plaintiff. When asked if the items of planing mill equipment were "machinery and equipment usual to sawmill operations," Wrigley hesitated and finally said "Yes, to the operation of a sawmill like that of Mr. Lundblade at Salmon Creek."

In this connection it must be remembered that Mr. Lundblade had just testified that he also operated a planing mill, separated by "a few feet" from the sawmill.

It must also be remembered that it is uncontradicted that there are approximately 250 sawmills in that part of the country, that only 11 of these also operate planing mills, and that these planing mills are separate and detached from the sawmills.

As to the equipment being usual to the operation "of a sawmill like that of Mr. Lundblade at Salmon Creek," it is set forth in the Proof of Loss, and admitted in Court, that the machinery on which loss is claimed was "special machinery and equipment in mill temporarily." It was there for overhaul, repair and resale. The operation at Salmon Creek, where there was a planing mill, is no criterion of "usual" sawmill operation.

Plaintiff's witnesses, naturally, tried to give the impression that a sawmill and a planing mill were merely parts of a whole. They did not, however, disagree with the definitions given by Webster.

> Sawmill. "An establishment having power driven machinery for sawing up logs; also a sawing machine used in such a place or for such a purpose."
>
> Planing Mill. "A mill in which material, especially lumber, is planed."

The National Encyclopedia says:

> "Lumber Industry. Lumbering or the production of timber products, covers the operations of logging

camps, sawmills, planing mills, veneer mills and cooperage stock mills.

"The principal products of logging camps include saw logs of various lengths, stave, shingle and heading bolts; poles; mine timbers; ship masts; railway ties; fence posts; wheel and handle stocks; excelsior stock and pulpwood. The products of sawmills include rough lumber, shingles, lath, sawed railway ties, and stock for cooperage, spool, pencil, penholder and veneer manufacture. Planing mills produce dressed, that is, smooth lumber; sash doors, blinds, interior woodwork and molding."

There is no conflict in the testimony that a sawmill produces a finished product; that is, "rough lumber," which is quoted and sold as such; as a matter of fact this is a matter of such general knowledge that it requires no evidence.

The evidence also shows that the lumber leaves the sawmill at the end of the "green chain" and goes to the yard or dry kiln for drying before going to the planing mill. The reason given for this is that green, wet lumber cannot be properly surfaced or molded.

We have no quarrel with the authorities cited in plaintiff's memorandum, even that holding that a planing machine is "machinery," but we cannot see where they are in point.

We cannot, however, follow the argument that irons and mangles are not part of "laundry equipment," as it is not usual to consider that "rough wash" is the end of a laundering operation.

We do contend that the "sawmill operation" terminates with the turning out of a finished product, namely, lumber. Whatever is done with that product later, whether it is to put it into a building as is, or is dressed or made into sash, doors or flooring, is another "operation."

There is a great dearth of authority on this subject, but we quote from a Federal decision:

" 'Sawmill. A sawmill is an establishment for sawing logs into lumber by power, often including other wood-working machines, such as lath and planing machines, and circular sawmills with their appurtenances, as well as mill chains, dogs and bars.' 38 C. J. 146, Sec. 11.

* * * * * *

"It is not every vocation or occupation in which the saw is used which is for that reason a sawmill. To so conclude might require a latitudinarian construction which would include everything from those monster mills manufacturing into lumber the Sequoia gigantea on the Pacific slope to the hut of the peasant of the Black Forest engaged in shaping toys wherewith to delight the immature imaginations of children. A sawmill, as defined by the law of Georgia, is not a planing mill, or a sash and door factory. There are sawmills which have such attachments, but they are not sawmills for that reason, but because they saw logs and timber; as they are cut from the forest, into the lumber of commerce."

*In re Gosel,* 127 Fed. 604.

(It should be pointed out that, immediately following the above, the Court quotes from the Standard Dictionary to the effect that planing mill machinery is often found in sawmills. However, there is nothing to show that this is "usual," or that it is not a separate mill.)

## II.

Whether or not plaintiff forfeited any right to recover for the edger.

It will be noted that in the letter of February 6, 1946, plaintiff states:

"We have your letter of Jan. 28th asking that we supply you with a list of items which we claim under our policy as being damaged or destroyed by fire on Dec. 2nd.

"The following is a list of the items which were not in use and were not in any connected with our

mill *or planing department* * * *. (Italics are ours, as showing that the present claim is an afterthought.)

Then follows a list of items, some priced the same as n the claim, some at approximately twice as much. After setting forth these items, there is added "*and several other items of incidental value.*"

But there is no mention of the edger, which the proof of loss shows as having a "present cash value" and "Amt. claimed" of $1250.

On at least two occasions Lundblade told the adjuster, at least once in the presence of Gardner, that he was making no claim for the edger. *As a result of his statements, and because this machine appeared to be stripped,* neither the adjuster nor the machinery expert (Gardiner) made any examination of this machine.

On at least two occasions plaintiff was told by the adjuster to comply with the policy conditions and to preserve the property, as it was the only evidence of his claim and as it would be necessary in case of appraisal.

On the trial we find that this edger had a value of from $2500 to $4000, although the proof of loss claims only $1250. We also find that, although at the trial it represented the highest value of any individual item, it was omitted "because the claim was so much in excess of the insurance coverage."

Why was it omitted, if it had such value, while items as low as $64.38 are included? Why was it the only machine which was stripped—if that is true? Why was it stripped, after plaintiff was instructed to preserve the property? Why was it not called to the attention of the adjuster, the machinery expert, and the appraisers? Frankly, because this story is absolutely unbelieveable.

This was unquestionably sawmill equipment. There was no need of trying to build up the claim with planing mill equipment of less value.

Where the insured refused to separate the damaged from the undamaged goods and make a complete in-

ventory, although her attention was called to the policy conditions, but sold the goods the day before making proof of loss, and appraisal was demanded, but failed, insured could not recover.

*Siegel* v. *Millers' Mut. Fire Ins. Co.* (C. C. A. 8), 29 F. 2d 988.

"Both insurance companies contend that the sale of the salvaged stock deprived them of their rights under the policy to examine the same and to have an appraisal, and, if they desire, to take it at its appraised value, or to replace the property lost or damaged with other of like character; that therefore the insured has violated the contracts and cannot recover thereon. It is without question that the proofs of loss were not served until February, 1927. The sale of the salvaged merchandise was in the forepart of January. It would seem, therefore, that the provision of the contracts hereinbefore set out was violated, and that the insurance companies were deprived of a substantial right thereunder. If the salvaged property was sold without the consent of the insurance companies, the insured forfeited the right to claim indemnity, and, unless there was a waiver of such provision, the insured cannot recover on these policies. The doctrine is stated in 26 C. J. 366; 'Under the provision which requires the insured to protect the property and separate the damaged from the undamaged property, etc., the insured cannot recover on the policy, in the absence of waiver, where he sells the property before the insurer has a reasonable opportunity to inspect it or appraise the damage.' *Astrich* v. *German-American Ins. Co. of New York* (C. C. A.), 131 F. 13; *Farmer's Merc. Co.* v. *Ins. Co.,* 161 Iowa 5, 141 N. W. 447; *Lancashire Ins. Co.* v. *Barnard* (C. C. A.), 111 F. 702; *Hamilton* v. *Liverpool, etc., Ins. Co.,* 136 U. S. 242, 10 S. Ct. 945, 34 L. Ed. 419; *Thornton* v. *Security Ins. Co.* (C. C. A.), 117 F. 773; *Oskosh Match Works* v. *Manchester Fire Assur. Co.,* 92 Wis. 510, 66 N. W. 525."

*New York Und. V. Ins. Co.* v. *Malham & Co.* (C. C. A. 8), 25 F. 2d 415.

(It will be noted that in our case there is no pleading, and of course no proof, of waiver.)

*Fuchs* v. *Sun,* 267 N. Y. S. 83.
*Johnson* v. *Hartford,* 157 N. Y. S. 893.

The decision of the Supreme Court in *Hamilton* v. *Liverpool (etc.) (supra)* is short and decidedly to the point. The insured refused to appraise and sold the goods and the judgment in favor of the insurer was affirmed.

In the case of *Oskosh Match Works* v. *Manchester,* insured sold the salvaged goods and the court held that it constituted a forfeiture.

It is clear that under the contract and the law, plaintiff forfeited any right to recover for loss to the edger, by failure to preserve the same, and by proceeding *the* sell parts, leaving only a stripped frame. This is true, even if one could believe his story as to why this supposedly valuable machine was omitted from the list submitted to the adjuster, why he stated he had no intention of making a claim for it, why he failed to call it to the attention of the adjuster, the expert and the appraisers.

We respectfully submit that judgment should be rendered as prayed by defendant.

September 3, 1947

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